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THE GROWING LAW*

My subject is the Growing Law. Growing rather than changing because the latter word connotes often a change for the worse; the actual process is in the long run a change for the better. The growth is for the most part the work of the courts. Of the three methods of development described by Sir Henry Maine, legal fictions and equity are obviously judicial in character. Statutes, though legislative in their origin, ultimately become what the courts make them. The Statute of Uses was meant to work a great change in the law in the interest of the King. In the hands of the Courts it increased the power of the tenant in fee simple and ultimately, as is said, did no more than add three words to a deed of bargain and sale. Chapter 24 of Edward the First's great Statute of Westminster the Second was on its face a mere regulation of procedure. In the hands of the courts it led not only to a most effective remedy but to the greatest development of substantive law and legal rights. New uses for the action on the case continued to be found for six centuries and new legal rights developed therefrom, until within the last fifty years the new procedure opened our minds to the idea that, even in the courts of law, where there is a legal right there must be a remedy whether we have a special name for the action or not. The reformed procedure may in the end prove the most effective machinery the courts can use in the development of the substantive law.

We need not go as far as the Statute of Uses or the Statute of Westminster the Second. For more than one hundred years our

* Address delivered before the graduating class of the Yale Law School, June, 1915.

courts have been construing the Federal Constitution and our national government is as much the result of judicial construction and definition as of legislative action.

The power and influence of the national tribunals has increased. The power of the state tribunals has kept equal step. Our state constitutions have become more and more codes of law in spite of the warnings of thoughtful lawyers, judges and statesmen. The constantly increasing limitations imposed upon legislative action in face of the certain knowledge that these limitations necessarily add to the power of the courts, is a tribute, unconscious and unavowed though it be, by the people to the integrity and the fidelity of the judges. We foresee the danger of relaxing the sense of responsibility in legislative bodies and executive officers but we are powerless to counteract the tendency to tie the hands of the political branch of the government and to throw responsibility upon the judicial branch. Further limitations are proposed by the convention in New York; amendments to the Federal Constitution prohibiting polygamy and the traffic in liquor are urged by influential citizens. The courts are not free from just grounds of criticism but have, upon the whole, worked to the satisfaction of the people because they are the nearest approach we have to a learned body acting upon motives of reason and not of passion, and disregarding to a greater extent than is found possible with legislatures or executive officers, or would be found possible with an electorate, considerations other than the very right of the case. We have therefore conceded to the courts, not without strong and intelligent opposition, a far greater power over the making of the law than has ever been conceded before. The opposition of intelligent men, of whom Chief Justice Gibson is a memorable example, to this control of the courts has in the past disappeared by force of necessity as the cases have arisen. Whether our judicial system can stand the strain that is put upon it as our constitutions become codes, may well be doubted. Some tribunal however must interpret the meaning of language and its applicability to the case in hand. The influence of the courts has increased because of the fairness of their methods, slow, too slow, as they often are. The patient hearing of both sides to a controversy, the legal forms devised for the protection of rights, the free discussion by those who decide, and not least important, the formulation of reasons to vindicate the result require time, but insure fair consideration.

The influence of the judicial tribunals on the growth of the law is likely to increase with the enactment of new statutes now proceeding so rapidly. Every word almost must be defined and construed to determine the rights of litigants. It may not always be what we now call a court that will define and construe. As the complexity of government increases, Boards and Commissions are established with what is substantially judicial power. What pleases the commission often has the force of law, but so strong is the system of the courts that Boards and Commissions almost as a matter of course pursue substantially the methods of the ordinary courts of law; notice, a hearing, formulation of reasons for the results reached and the embodiment of those results in orders or judgments are the essential elements, call them by what name you will. The necessity for some one tribunal that shall ultimately decide between conflicting results in lower tribunals will always be recognized. Congress has recently extended the appellate jurisdiction of the Supreme Court to cases where State tribunals have decided in favor of and not against a claim of Federal right. The process of definition and construction is a never ending one. For more than forty years the courts have been defining the words liberty, property and due process of law as used in the 14th Amendment to the Federal Constitution and the end is not yet. Whether or not the Congress and the Legislatures that adopted the amendment meant to secure more than the civil rights of the recently enfranchised colored race against hostile action by their former owners, is a question of no present importance. It has long been settled that the amendment applies not only to all natural persons, black or white, but to artificial persons.

These thoughts are familiar to all of you. I have recalled them because they emphasize the power necessarily devolved upon the courts in making even the statute law by defining and construing the language used by our legislatures or, under our constitutional theories, sometimes by the people.

The development of the law by the processes which Maine calls equity and fictions, is quite as important in its effect upon the rights of men as the construction of statutes. Growth by the extension of legal principles seems more naturally the work of the courts than growth by judicial construction of statutes and constitutions. The old equity heads of fraud, mistake and trust are constantly extended by new interpretations; the courts of law

are permeated with equitable doctrines. We hold men to implied contracts, but the implied contract is a mere fiction devised by the courts of law to enable them to do justice where justice is impossible on the strict conception of contract or tort. As in earlier days the action of *assumpsit* was based upon the theory of a tort and by means of a fiction, a recovery was permitted upon the theory that the failure to perform a contract was in the nature of a trespass, so we have come to allow a recovery where money ought to be paid *ex aequo et bono* upon the fiction of a contract that never existed. One of the more recent fictions, called by Pollock one of the most brilliant fictions of the Common Law, is that an agent who acts without authority impliedly warrants that he has such authority. There is no authority in fact from the principal, there is no warranty in fact by the pretended agent to the third party; but justice is served by assuming a warranty that does not exist and forbidding the pretended agent to deny it. The doctrine of equitable estoppel which closes a man's mouth when he ought not to speak, and the doctrine of equitable conversion which enables us to escape from the unfortunate historical distinction between real and personal property by treating that as done which ought to be done, have often enabled the courts to do justice. The very use of the word ought marks the tendency of the law to an ethical standard, away from archaic formalism. At common law, fraud in the consideration of a sealed instrument could not be set up as a defense; a sealed instrument was too solemn a thing to be trifled with. We are so far away from that doctrine that we are sometimes in danger of forgetting that the defense of failure of consideration is not applicable to a case of formal contracts under seal where neither party meant that there should be a consideration. Our zeal for progress and growth will often lead us astray unless we know the history of the law and keep fast hold of the principles upon which it is founded.

The tendency from formalistic conceptions to ethical conceptions marks the growth of the law in many ways. We no longer ask whether the word "warrant" is used upon a sale of chattels as when *Chandelor vs. Lopus* was decided; we have come to the view of Baron Parke that where a man sells goods by description he warrants the description as true. We may come in time to hold men to responsibility for their representations as to material facts on which others are expected to act and by which others are cheated of their money, whether the elements of fraud

are present or not, whether the affirmation is made with knowledge of its falsity or in mere ignorance and carelessness whether it be true or not. These are cases where there is fault on the part of the defendant. There are cases in which we are going back to a medieval conception of a common responsibility, without personal fault, the responsibility of a family, an association, a community, which until recently was chiefly known in our law in the liability of a municipality for damage by rioters. The Workmen's Compensation Acts rest on what is fundamentally the same theory. Although sometimes expressed in terms that every industry should pay its own costs of production, or that the waste of human life and force caused by modern methods of great power and rapidly moving machinery, should be a charge upon the industry, and not upon the unfortunate sufferer or his family, yet in fact every one expects what will no doubt be the actual result, that the loss will be distributed as taxes are distributed, and part at least will fall upon consumers and be paid in higher prices, or be distributed through the methods of insurance among a still larger public. We need not speculate upon the question whether in the long run workmen will be helped, or whether part of the burden will fall upon them through a reduction of wages or a failure to secure an advance which they would otherwise receive. The economic problem may be left to the economists. The interesting legal point is that there is a legal liability without fault, a liability much more extensive than that which grew out of the rule *respondeat superior*, qualified as that was by the fellow servant rule and the theory of assumption of risk. The familiar history illustrates how the law grows. The sense of right prevailing in the time of Lord Holt, the development of the rule and its application to particular concrete cases by logical deduction or by analogy, the qualification by distinctions and refinements still in harmony with fundamental legal principles as the injustice in particular cases became apparent, and finally the intervention of the legislature by statute to make the law correspond with changed public opinion of what is just. To what extent the statutes change the law must be determined by definition and construction by the courts. No man can foresee how far new legal conceptions may lead us. To put some of the cases recently stated by Judge Smith: (1) In a collision on the highway between a trolley car and a wagon, not due to any one's fault, but due to mere accident, the motorman and a paying passenger are injured; the motorman recovers by virtue of the

Workmen's Compensation Act; the paying passenger can recover no compensation. (2) In a collision on the highway between an automobile driven by the owner's hired chauffeur and a wagon driven by the owner, not due to any one's fault, but a mere accident; the chauffeur can recover the statutory compensation from the owner of the automobile; the owner of the wagon has no right of action. (3) Collision on the highway between trolley car and wagon driven by its owner, due in part to the negligence of the motorman and in part to the negligence of the driver of the wagon; both motorman and driver are hurt; the contributory negligence of the driver of the wagon prevents his recovery from the trolley company; the negligence of the motorman does not prevent his recovery of the statutory compensation. (4) A steam boiler in a machine shop explodes without the fault of any one. A workman in the shop is injured, and a neighboring building is damaged. The workman can recover from the owner of the shop, his employer, but the owner of the building has no remedy. Such inconsistencies must eventually lead to a change that will assimilate the rules of liability in the different cases. The change is not likely to be the repeal of our new statutes. We are more likely to hold liable those by the conduct of whose business, injury to others has been caused. I do not question that this change may be brought about by the courts. What I have already said has been to little purpose unless I concede that the courts "can and do make new law; and also can and do unmake old law." It probably will not be done directly and avowedly, but may be done indirectly, as Judge Smith suggests, by a very liberal construction of the doctrine *res ipsa loquitur*; by a broad view of what constitutes *prima facie* evidence of negligence; and by compelling the defendant to prove that he was not negligent, instead of compelling the plaintiff to prove negligence. By these changes the theoretical basis of liability would still be the negligence of the defendant; the practical result would be to change the existing rule and assume negligence in the absence of proof to the contrary. Perhaps the effect of the change would not be great. Imperceptible and unavowed changes in the law sometimes come from the refusal of jurors to render verdicts, but sometimes also from a change of the views of judges. Every one familiar with personal injury cases must be impressed with the change upon the questions whether there is any evidence of negligence to go to the jury, whether the defendant has proved contributory negligence, and whether the risk has been assumed.

It is within the power of the courts to change the law. They ought to leave that to the legislature. The difference is fundamental. The legislature provides for the future. The courts deal with the past, and it is shocking to think that a man can be held to accountability by a change of judicial construction under circumstances in which he was not legally liable at the time. Retrospective statutes and *ex post facto* laws are no more reprehensible than retrospective changes of the law by judicial decision. It is forbidden to make a new crime by *ex post facto* legislation. It is equally wrong to make a new tort or crime by a change of judicial construction. We are witnessing another change. It becomes more and more common to make misdemeanors of violations of law that may well be the subject of penal actions but ought not to be treated as crimes. Two reasons lead to such statutes; the exploded notion that severity of punishment acts as a deterrent, and the positive advantage of having prosecutions conducted at public expense and risk. We do even worse. We forget the wholesome principle that requires criminal intent, a criminal mind, and we seek to hold men as criminals for acts the illegality of which has been doubtful even to the courts, or acts which are pronounced illegal in the face of previous decisions to the contrary. Some way will no doubt be found to escape such injustice, as the courts have found ways to escape before.

In 1798 the Supreme Court of the United States decided that the prohibition of *ex post facto* laws in the Federal Constitution applied only to statutes relating to crime. Regret was expressed in the opinion that retrospective laws affecting property should be passed, but the constitutional prohibition was held inapplicable to those cases. Twenty years later, in 1819, the court decided that a provision of a charter of a private corporation was a contract, protected against hostile state legislation by the Federal Constitution. Vested rights were thereby given protection perhaps greater than if the *ex post facto* clause had been construed to forbid retrospective legislation. Subsequently it was found that this rule tied the hands of the state when they ought not to be tied, and the doctrine of the police power was invoked to limit the rule. The police power has proved a most potent instrument for sustaining the powers of government and limiting property rights. It is a long way from the decision of the New York Court of Appeals in 1856 that a law prohibiting the sale of intoxicating liquors owned by any person within the state when the act took effect, was unconstitutional, to the decision of the United States

Supreme Court in 1887 that the prohibitory legislation of Kansas did not deprive the citizens of the state of their constitutional rights. We have traveled farther in the last thirty years. The police power is now broadly defined as extending to all great public needs and it is said may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Does this definition, broad as it is, go further than that of Chief Justice Shaw sixty years ago, when he said that all property is held subject to those general regulations which are necessary to the common good and general welfare? Neither definition helps much in the solution of a particular case. What is the prevailing morality, what is the strong and preponderant opinion, what does the common good require, what is greatly and immediately necessary to the public welfare? The decision must be left to the courts in concrete cases, and the decision of to-day is likely to differ from what it would have been twenty-five or fifty years ago. The point of view of the courts is more important than the language in which the police power is defined.

The final determination of the validity or meaning of a statute by the courts has great disadvantages. A plain man ought to be able to tell by examination of a statute whether certain conduct would be criminal. This is sometimes impossible, especially with the great mass of recent legislation affecting matters of business. The meaning of some statutes is difficult for anyone to guess. The Supreme Court of the United States has recently been called upon to pass upon a conviction for the crime of combining to depreciate below, or to enhance above, its real value the price of any article. The real value was declared by the state court to be "its market value under fair competition, and under normal market conditions." The defendants were therefore, as the court said, required to guess at their peril what their product would have sold for if a combination had not existed, and nothing else violently affecting values had occurred. The amount paid for materials and labor had increased in a greater ratio than the cost of their product. They were called upon to guess what would have been the price of their article in an imaginary world on pain of being punished as criminals. The court held that the legislation exceeded the constitutional power of the state. What other result could do justice? Probably most of us feel that Lord Bowen went too far in declaring that competition must be carried to the bitter end; but can the difficulty be solved by an attempt

to compel competition on the one hand and to say it shall go so far and no farther on the other? Is it possible to set a fixed bound in a changing world? The solution is rather that to which we are slowly struggling,—that the wrong is in the intent to do harm to your neighbor as your direct object, not in the harm that is merely incidental to the conduct of business for your own profit as efficiently as you can. Such a solution is in harmony with the general ethical tendency of the law that an act otherwise doubtful in character may be right or wrong according to the good or the bad intent of the actor. The legality of a high fence may depend on whether it is spiteful or not.

The great discussions of recent times have centered about the clause of the 14th amendment forbidding a state to deprive any person of liberty or property without due process of law. Liberty and property are common words, but their exact legal connotation is exceedingly difficult. Hundreds of cases and thousands of pages have not accomplished the task of defining either with precision. If there ever had been or could be absolute property or absolute liberty, we might hope some time to state finally what the words mean. But the right of liberty and the right of property have always been circumscribed by the similar rights of others. In a civilized society no man lives or can live to himself alone. All property is necessarily subject to the application of the maxim *sic utere tuo ut alienum non laedas*, to the right of eminent domain, to the right of the state to take by taxation. Inasmuch as the exercise of any right of property by the owner may injure another, the Latin maxim does not help to a solution; the real question is what injury to another is, and what is not permissible. You may build a sky scraper and shut off your neighbor's light and air; you may use your property in fair competition, although it drives your neighbor out of business; you may not resort to unfair competition; and here again we must define what is unfair. The state may condemn property for public uses upon making compensation; but what is a public use? It may take a portion by way of taxation for a public purpose; what is a public purpose? The conception of property is not only difficult in itself, but differs with the times and changes with changing circumstances. Forty years ago it was arguable whether the prices to be exacted by railroad companies for transportation could be fixed by the companies without control by the public authorities. During the forty years that have passed, the sphere of public control has broadened and the property rights

of all public service companies have been qualified. The rates they may charge, the wages they shall pay, the kind and amount of service they shall render, are all subject to the public authority. Apparently all that is left is a right to select the managers of the business who may make a profit for the owners if they can, under the conditions imposed upon them. Recently the court has required the owners of terminal facilities at a great city to allow others the use upon equal terms. The substantial effect is to make the owners trustees for all transportation companies. This decision is perhaps the greatest step yet made toward the socialization of property. The decision that all the banks of a state may be compelled to insure the security of depositors in every one, is another great step. These two decisions alone, though there are many others leading in the same direction, show the qualification of the concept of private property by judicial construction in the direction of paramount public right. The necessary tendency of civilized communities where men live in close contact with one another, is to subject private interests to what is supposed to be for the public welfare. There grow up, on the other hand, new kinds of property of great value. A vain attempt was made in the eighteenth century to establish a right of property in intellectual productions,—a common law copyright. It failed and it was not until the 19th century that copyright was established by statute,¹ and only late in the century that this right of intellectual property became international; even now it is limited in time. On common law principles there is also in some cases a sort of copyright before publication. The goodwill of a business is a well recognized species of property, and it has even been claimed, I believe thus far without success, that the expectation of future profits might be capitalized as if it were existing property. Going value is a species of property, the character of which has perhaps not been finally settled. The con-

¹ I leave this as I wrote it, although it is inaccurate. Mr. George Haven Putnam has called my attention to the fact that the King's Bench decided that there was a common law right of copyright after publication, and that a majority of the judges in the House of Lords held that this was taken away by the Statute of Anne. *Millar v. Taylor*, 4 Burrows 2303; *Donaldson v. Becket*, 4 Burrows 2408. The report of the latter case requires to be supplemented by other reports, which are summarized in 7 English Ruling Cases 70, and in Putnam's "The Question of Copyright," 412 ff. My statement that it was not until the 19th century that copyright was established by statute is a blunder.

test still goes on over the question to what extent special franchises are valuable property; that they are property for some purposes is well settled. Patent rights, often a most valuable property, have been created by statutes. The courts have created a property right in trade secrets by protecting them from disclosure; and in trade marks, brands and packages by protecting them from unfair competition and piratical imitation. Equitable easements are the creation of the courts. Perhaps the so-called right of privacy may be called a property right; it is coming more and more to be regarded as a personal right; but the courts have frowned upon the contention that the reputation in the South of belonging to the white race is a right of property.

The right of liberty embraces more than the mere right to be free from personal restraint. It includes the right to enjoy a man's faculties, and to use them in all lawful ways; to live and work where he will; to pursue any livelihood or avocation, and enter into all contracts proper, necessary and essential; but there is no absolute freedom of contract. If there were, a system of slavery might be established, notwithstanding the thirteenth amendment to the Federal Constitution, for that amendment forbids only involuntary servitude. Contracts have been made voluntarily by men perfectly able to contract on terms of equality, which amounted to a perpetual sale of personal services, and if enforced in equity by the process of injunction, would be a very real slavery. Such a contract might be advantageous to the servant, by securing to him food, shelter and raiment for his life better than he could otherwise secure for himself, but has for years been condemned as an unlawful restraint of trade. Yet a child under twenty-one is in the father's power and legally little better than a slave, sometimes in need of the protection afforded by our acts forbidding child labor. The courts have always restricted freedom of contract. There was a time when if a man entered into a bond upon condition and failed to perform the condition, he became liable for the amount of the bond; the courts interfered and held that the amount of the bond was a penalty only, to secure performance of the condition, and not a debt due immediately upon failure to perform the condition in exact accordance with its terms; the parties might have contracted freely, but the courts refused their aid to the unconscionable bargain. Oftentimes the parties to a contract try to settle for themselves what shall be paid for its breach, and agree on liquidated damages; the courts will, according to a presumed

intent, treat the sum agreed upon as damages to be paid, or as a mere penalty intended to secure the actual damages only. A mortgage is a deed which by its terms becomes absolute on failure to perform the condition; it has not for centuries been in fact the deed which the parties on its face declare it to be, and it is impossible for the parties by any form of words, short of a complete change of the nature of the transaction, to do away with the equity of redemption which has been created by the courts in spite of the formal agreement of the parties. The rule as to an equity of redemption is ancient, and may well be said to be made part of every mortgage by the law. But in recent years the enterprise of brewers has undertaken to impose as one of the terms of mortgages securing the repayment of money loaned for the purchase of a public house, an agreement to buy beer of the mortgagees. The courts have refused to enforce such contracts, because the agreement, as is said, clogs the equity of redemption. Clog is an expressive metaphor; the plain fact is that the courts refuse to enforce the contract the parties have voluntarily made. Contracts in restraint of trade is an old title in the law, which long ago acquired the special meaning of contracts in unreasonable restraint of trade, and retained that meaning until within twenty years an attempt has been made to declare all contracts in restraint of trade invalid, not only in disregard, perhaps in ignorance, of the history of the law, but of the very obvious fact that every contract is necessarily a restraint of trade to the extent that it is binding. Contracts in restraint of marriage have always been illegal, from public considerations, without regard to possible pecuniary advantage of the parties. Contracts of counsel and physicians for fees were long illegal, perhaps are still in many jurisdictions. Wagering contracts are no longer permitted. Freedom of contract has never been the rule as between attorney and client, guardian and ward, trustee and cestui que trust, dependents and those in a dominant position over them. Public policy has made these exceptions to the rule of freedom of contract, but public policy is an unruly steed, and likely to throw an incautious rider. We must not forget what Lord Bramwell said, that public policy requires the enforcement of contracts.

The tendency toward limitation of freedom of contract is strong. We not only regulate by statute the hours and conditions of labor, require the payment of wages in cash, regulate the relations between employer and employee and labor unions,

but we forbid contracts not to take advantage of the statutes. Some of the most puzzling decisions arise in cases in which common carriers or insurance companies are involved, in the very obvious effort of the courts to save careless shippers and thoughtless assured, from the contracts they have in fact made. I have known a policy of fire insurance to be reformed, in the interest of the assured, although there never was any contract between the parties other than the policy itself. The interference with contract by the import of new terms by judicial implication, by statutory enactment, or by strained construction, originates in the effort to prevent one in a position of vantage or gifted with superior knowledge, from using his advantage in his dealings with those less fortunate. We cannot help sympathizing with the feeling when we read the terms imposed upon bootblacks, upon lumbermen, upon negroes in the South, and even upon actors and actresses. Contracts that inevitably result in oppression may well be regulated or forbidden by statute, but it is exceedingly hazardous for courts to strike out or refine away the plain words of a written agreement. The truth is that many of the relations of life cannot well be regulated by contract at all; for one party, and often both parties, make the contract relying quite as much upon the custom of the time and place as upon the written terms. I believe the difficulty between landowners and land cultivators in Ireland before Gladstone's legislation was largely due to the fact that the landlords relied on their strict legal rights by contract, and the tenants relied on the custom to renew their leases. The general tendency is to favor the weaker side, but there is one striking case where, for obvious reasons, the ordinary constitutional safeguards have been disregarded in favor of the stronger party. The provision of the Federal statutes for the summary arrest and detention of seamen deserting their ship before the conclusion of the voyage, has been sustained as a constitutional exercise of power, notwithstanding the 13th Amendment. The weaker side in a bargain might be protected by a method more in analogy with legal principles and by the development of old principles in the ordinary method of the courts. It has always been held that contracts obtained by duress are void. The duress that has usually been meant has been duress of the person by personal restraint or by threats that would overcome the will of a firm man. Duress, it has been pointed out, may be quite as effective when it proceeds from economic forces, and in effect presents to a man the alternative

of accepting onerous, even outrageous terms, or submitting to starvation. This view is the theoretical justification for much recent legislation. Better results might perhaps be worked out by determining in each case whether in fact an unjust bargain was forced by economic pressure; for statutes of broad general application may themselves work injustice by applying legislative pressure, quite as effective as economic pressure, though working in the opposite direction.

The greater the experience of a lawyer or a judge, the more he distrusts broad general principles and theories, and the more important he thinks it to confine the decision to the particular case. General principles and legal theories are useful, but they are useful to point out or illuminate the road, not as a guide for our footsteps. If we depend upon them, we are in danger of pitfalls. The theory of the law of nature served a very useful purpose for many centuries; it still lies at the basis of international law, but is to-day as antiquated as the theory of the social compact which played its part, and a great and momentous part too, in the history of political theory. The expression "social justice," much as I dislike the addition of the adjective, points out the importance of considering the interests of the organized state and the interests of the people who compose political societies. Lawyers and judges fall into habits of mental indolence and take for granted the absolute correctness of legal rules, and apply them mechanically. It is well to stir us to thought, that we may not forget that the letter killeth and the spirit maketh alive. Economic pressure, the struggle of men with one another for the means of living, makes judicial tribunals necessary. But for economic pressure, no man would indulge in the expensive luxury of litigation. With the increasing power of the state, law becomes more necessary to protect individuals and to define the limits of state action. Law, says Ihering, is the intelligent policy of power; it is the subordination of the state to its own laws; it is conditioned on self control,—a matter of practise and habit, and is guaranteed by the feeling of right and the administration of justice. The importance of law as the protection of the weak increases as the difference between the whole power of the state represented by organized society, and the weakness of the individual citizen becomes more and more marked. Capitalists combine in corporations and corporations in greater corporations, to protect by their united strength their property from unjust exactions of power, where individuals how-

ever strong, must sooner yield. Workmen combine in unions to give to each the benefit of the power of all. Stockholders and bondholders combine in committees to protect their interests where the burden would be too great for one man alone. Mere words and definitions, constitutions and bills of right, will not of themselves secure justice, important as they are, since some one must construe and apply them to concrete cases. The decision of a majority of such voters as choose to go to the polls and to vote upon the question, upon the merits of a particular case, is not likely to be as satisfactory as the decision of a bench of trained lawyers determining the dispute in the cooler atmosphere of legal reasoning, according to settled rules, the result of long experience, rather than by the whim of the moment or the seeming justice of the case, though some of the rules may be in fact archaic and others may seem absurd to those who do not know and are not willing to learn the historical reasons back of them. The application of these rules must be worked out by trained men. When the legal rule is settled, we need only apply it to the particular case. When it is not settled, it is better that a rule should be gradually established by a process of inclusion and exclusion, building up a general rule by a process of induction in accordance with our time-honored methods, rather than by a merely logical deduction from broad general theories of law, and surely better than by a deduction from our own economic or political theories, or our own guesses as to public policy. The general sense of intelligent men must in the long run be satisfied with the essential justice of legal rules. Laws are always unstable, says De Tocqueville, unless founded upon the manners of a nation. Pascal has the same thought: "One," he says, "affirms the essence of justice to be the authority of the legislator; another, the interest of the sovereign; another, present custom, and this is the most sure. Nothing according to reason alone, is just in itself; all changes with time. Custom creates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority." Lawyers may learn from the theologian and philosopher. When we find a legal principle firmly established, and find that men have made their contracts, acquired their property, are bound in family relations of marriage and parentage, have regulated their lives, in reliance upon the law, it shocks every sense of justice for a court to reject the established rule, declare contracts invalid, titles worthless, a lawful wife a concubine, and children illegitimate. A rule

once established must be adhered to in all cases that have arisen thereunder; the legislature may change it in its application to future cases. We need not make a fetich of *stare decisis* as Mr. Carter said in his argument for the Government in the Income Tax case, although in that case he insisted that the question had been so settled that it was not then open to debate. Cases have arisen, as Justice Bradley said, where dicta and even decisions have been modified, but, he added, it is always done with great caution and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the constitution in all its parts. Adherence to precedents is the glory of the English law, not a mere slavish following of some decided case in a mechanical way, but the application of legal principles as established by or deduced from the decided cases, to new questions as they arise, by a process of logic, by the analogies of the law, by reference to the customs of the time, or by clear ethical principles. We are forced in new situations to determine what rule will seem most just to honest and intelligent men, conversant with the subject. Lord Mansfield inquired into the custom of the best merchants. We inquire to-day into a question of foreign or international law as a fact. Why may we not in our effort to decide new questions, inquire into our own customs as a fact? That we should do so in reality if not ostensibly, is inevitable. Custom may not always be a safe guide and cannot be followed blindly. It must sometimes be subjected to an independent ethical test. In many ways lawyers trained in the fundamental ideas of the law of trusts have a sounder morality than business men who have often thought it no wrong to take secret commissions, or to profit personally by contracts with corporations they control. The law has always been in advance of business morality. Cases may occur where business is conducted according to business rules which may conflict with express legislative enactment. It is said that transactions in stocks and bonds involving millions are conducted in reliance on the pledged word of brokers; the courts cannot for that reason hold that contracts are enforceable where there is a lack of the memorandum made necessary by the Statute of Frauds.

What I fear most is the development of law according to some preconceived theory,—economic, social, or even legal. The Common Law owes its strength to the fact that it has developed step by step, as the need has arisen, never taking so long a step that its path could not be retraced if we were found to have gone

astray. If the law is to be enduring it must be suited to the habits and custom of the people. It must necessarily be more or less of a compromise between different theories, a composite of different, sometimes warring, forces. The needle oscillates but finally points to the Pole. It would be a mistake to put individual interests always ahead of social interests as it would be a mistake to put social interests always ahead of individual interests. We are interested in freedom of speech, but freedom of speech must not degenerate into slander and libel, and the task of the law has been by decisions in concrete cases to mark the bounds of permissible and unpermissible freedom. Society is interested in such an administration of the criminal law that no guilty man shall escape; but society, as well as the individual, is interested in securing the freedom of every innocent man; we therefore presume one indicted for crime to be innocent although at least twelve men have said that he should be presumed to be guilty. At one period of legal history we allow criminals to escape on the slightest technicality because the punishment in case of conviction is shocking to our sense of justice; a man who is charged with stealing a white horse escapes if it proves to have been black and white. At another time we amend indictments in order to prevent an absurd miscarriage of justice. The law has in the past shared in the anxiety of the people for a rapid development of resources and has favored the individual. To-day it is sharing in a humanitarian movement which protects the weaker members of society though it may check material development and growth. Who shall say which policy in the long run, if steadily adhered to, would be for the best interests of the community,—the policy which would allow the weakest to be relentlessly driven to the wall, and strengthen the community of the future by the process of natural selection, or the policy which would preserve and protect the weaker? I think we have been wise not to allow our law to be entirely controlled by either theory. I hear of social justice. I do not know what the addition of the adjective means. Probably it is meant to indicate that more regard should be paid to the interest of the community than to the interest of the individual citizens; but the interest of individual citizens is often the interest of the community. Attempts have been made for many years to insure freedom of competition, but they have been accompanied by efforts to prevent too much competition, and the same legislative bodies have enacted statutes to prevent raising prices to the detriment of the consumer and to prevent lowering

prices to the detriment of weaker competitors or of producers; until they have culminated in the absurdity which the United States Supreme Court has condemned, requiring sales at the real value of the commodities, without pointing out how that real value can be determined.

Social considerations in the administration of justice are not new. The innkeeper and the common carrier were never allowed to make such contracts as they chose and they were required to insure the safety of goods entrusted to their care or within their protection. Even when they were allowed to make contracts to lessen the rigor of their legal liability, they were forbidden by judicial construction to make contracts exempting themselves from liability for the negligence of their servants and in some cases from making contracts that would enable them to make their compensation proportionate to their risk of loss.

I have achieved my object if I have shown that the law is a living, vital, growing, and therefore a *changing organism*. It must continue to live, to grow, to change, but the changes ought to be by the processes of growth and not by the processes of destruction. This will be best achieved by constantly bearing in mind that the law is the resultant of many forces,—the history of the past, the needs of the present, the hopes of the future, and that we will achieve the best results by adapting the old principles to the new needs in the light of our hopes, and not by hastily discarding as unsuited to the present, principles that we do not know how to develop. New crops can constantly be raised out of the old fields, but only by men who know how to cultivate them. Hitherto the work has been done almost wholly by judges. A new force has come to the front in our country. Lawyers now in the prime of life have been trained in law schools, and our reports begin to show the results. The demand for law schools has made possible the existence of a trained body of students and teachers who study the law purely as a science and obtain an historical experience from books wider than any judge can obtain in his short life from personal experience of men and affairs. Students and teachers are not burdened with the difficulty of ascertaining the facts of a particular case, and can devote themselves to the study of legal principles as exemplified in innumerable cases in different jurisdictions, at different times, under different systems of law. Practicing lawyers are absorbed in the interests of their clients. Judges must devote the larger part of their time to the ascertainment of the exact

facts of pending cases. Not one case in a hundred gives a court any trouble, or leads to any difference of view, as to what the law is; the difficulty generally is to apply well known legal principles to the facts of a particular case. The scientific advance must come from the schools of law. The time may come, perhaps at no distant time, when our law schools shall attain the high distinction of the medieval schools of Bologna and Bourges. They will surely supplant our courts as the authorized and revered expositors of the law unless the judges can in their opinions break away from the tiresome reiteration of legal principles known to the youngest attorney, and the citation of endless authorities for indisputable propositions, and confine themselves to the task of pointing out the precise principle applicable, the distinction from former cases, and avail themselves of the rare occasions when legal principles can be legitimately developed to meet new situations. Most of us, occasionally at least, mistake the industry of the clerk for the learning of the judge. We already look to the law reviews from the various law schools for the scholarly and scientific discussion and development of the law rather than to the opinions of the courts. The courts must always, however, be the tribunals which put legal principles to the final test, for the law is not only a science but an art, and the dangers of academic discussion can be avoided by submitting the theories of the closet to the test of practical experience. Mr. Justice Holmes has well said, the life of the law is not logic, but experience.

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